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No.

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IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1989

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EDDIE S. YLST, WARDEN

Petitioner,

v.

OWEN DUANE NUNNEMAKER

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether *Harris* v. *Reed*, ___ U.S. ___, 109 S.Ct. 1038 (1989), holds that a state high court's denial of habeas corpus relief, which is not a decision on the merits under state law, forgives a procedural default expressly claimed by an intermediate state appellate court on direct review.

## TABLE OF AUTHORITIES


| CASES | Page |
|---|---|
| *Arce* v. *Smith*<br>889 F.2d 1271 (2d Cir. 1989) | 34, 42 |
| *Booker* v. *Lynaugh*<br>872 F.2d 100 (5th Cir. 1989) | 41 |
| *Durosko* v. *Lewis*<br>882 F.2d 357 (9th Cir. 1989) | 41 |
| *Edwards* v. *Butler*<br>882 F.2d 160 (5th Cir. 1989) | 41 |
| *Ellis* v. *Lynaugh*<br>873 F.2d 830 (5th Cir. 1989) | 42, 45 |
| *Gardner* v. *California*<br>393 U.S. 367 (1969) | 25 |
| *Griggs* v. *Superior Court*<br>16 Cal.3d 341<br>128 Cal.Rptr. 223 (1976) | 22 |
| *Harmon* v. *Barton*<br>894 F.2d 1208 (11th Cir. 1990) | 34, 42 |
| *Harris* v. *Reed*<br>109 S.Ct. 1038 (1989) | 11, 14, 15, 17, 19, 29, 34, 35, 37, 41, 43-45, 47, 48 |
| *Harris* v. *Superior Court*<br>500 F.2d 1124 (9th Cir. 1974) | 37 |
| *In re Bevill*<br>68 Cal.2d 854,<br>69 Cal.Rptr. 599 (1968) | 27 |




## TABLE OF AUTHORITIES (cont'd.)


| CASES | Page |
|---|---|
| *In re Crow*<br>4 Cal.3d 613,<br>94 Cal.Rptr. 254 (1971) | 25, 26 |
| *In re Dennis M.*<br>70 Cal.2d 444,<br>75 Cal.Rptr. 1 (1969) | 18 |
| *In re Egan*<br>24 Cal.2d 323,<br>149 P.2d 693 (1944) | 25 |
| *In re Hillery*<br>202 Cal.App.2d 293,<br>20 Cal.Rptr. 759 (1962) | 21 |
| *In re Hochberg*<br>2 Cal.3d 870,<br>87 Cal.Rptr. 681 (1970) | 22, 26 |
| *In re Lewallen*<br>23 Cal.3d 274,<br>152 Cal.Rptr. 528 (1979) | 22 |
| *In re Lynch*<br>8 Cal.3d 410,<br>105 Cal.Rptr. 217 1972) | 27 |
| *In re Masching*<br>41 Cal.2d 530,<br>261 P.2d 251 (1953) | 24 |

## TABLE OF AUTHORITIES (cont'd.)


| CASES | Page |
|---|---|
| *In re Mazoros*<br>76 Cal.App.3d 50,<br>142 Cal.Rptr. 609 (1977) | 26 |
| *In re Michael E.*<br>15 Cal.3d 183,<br>123 Cal.Rptr. 103 (1975) | 27 |
| *In re Miller*<br>17 Cal.2d 734,<br>112 P.2d 10 (1941) | 27 |
| *In re Saunders*<br>2 Cal.3d 1033,<br>88 Cal.Rptr. 633 (1970) | 23, 24 |
| *In re Swain*<br>34 Cal.2d 300<br>209 P.2d 793 (1949) | 22, 30 |
| *In re Terry*<br>4 Cal.3d 911,<br>95 Cal.Rptr. 31 (1971) | 27 |
| *In re Waltreus*<br>62 Cal.2d 218,<br>42 Cal.Rptr. 9 (1965) | 27, 29 |
| *McQuown* v. *McCartney*<br>795 F.2d 807 (9th Cir. 1986) | 45 |
| *Miranda* v. *Arizona*<br>384 U.S. 436 (1966) | 13, 16, 18, 19, 30, 32, 35, 48 |




## TABLE OF AUTHORITIES (cont'd.)


| CASES | Page |
|---|---|
| *Myers* v. *Ylst*<br>897 F.2d 417 (9th Cir. 1980) | 28, 46 |
| *People* v. *Green*<br>27 Cal.3d 1,<br>164 Cal.Rptr. 1 (1980) | 23 |
| *People* v. *Medina*<br>6 Cal.3d 484,<br>99 Cal.Rptr. 630 (1972) | 28 |
| *People* v. *Pacini*<br>120 Cal.App.3d 877,<br>174 Cal.Rptr. 820 (1981) | 22, 23 |
| *Russell* v. *Lynaugh*<br>892 F.2d 1205 (5th Cir. 1989) | 33, 42, 44, 45 |
| *Thompson* v. *Procunier*<br>539 F.2d 26 (9th Cir. 1976) | 37 |
| *Wainwright* v. *Sykes*<br>433 U.S. 72 (1977) | 12, 16, 17, 21 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **STATUTES AND OTHER AUTHORITIES** | |
| 28 U.S.C. | |
| § 1254(1) | 3 |
| § 2101(c) | 3 |
| § 2254 | 4 |
| California Constitution | |
| art. I, § 11 | 21 |
| art. VI, § 10 | 21 |
| art. VI, § 14 | 28 |
| California Evidence Code | |
| § 353 | 18 |
| Cal. Pen. Code | |
| §§ 187 and 245(a) | 6 |
| §§ 1473 *et seq.* | 21 |
| § 1474 | 22 |
| § 1475 | 26 |
| § 1480 | 22 |
| § 1484 | 23-25 |
| § 1506 | 26 |
| §§ 12022 & 12022.5 | 6 |
| Supreme Court, rules 13.1, 13.4 | 3 |
| California Rules of Court, rule 28 | 26 |
| Supreme Court of California Practices and Procedure (1990 Rev.) at 12, 13 | 39 |


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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed February 21, 1990 and amended May 25, 1990.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 896 F.2d 1200 (1990), and was amended upon the denial of rehearing. ___ F.2d ___. A copy of the amended opinion is attached to this petition as Appendix A. The order of the District Court denying the petition for writ of habeas corpus was unreported. A copy of that order appears as Appendix B.

The opinion of the California Court of Appeal, First Appellate District, was unreported and appears as Appendix C.



## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1990. Rehearing was denied on May 25, 1990. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering



such process ineffective to protect the rights of the prisoner."

## STATEMENT OF THE CASE

A. State Proceedings.

By an information filed in Sonoma County Superior Court on August 21, 1975, respondent Owen Duane Nunnemaker was charged with murder and assault with a deadly weapon, in violation of California Penal Code sections 187 and 245(a). It was further alleged that during the commission of both offenses, respondent was armed with, and did use, a firearm, in violation of California Penal Code sections 12022 and 12022.5. On January 30, 1976, the jury found respondent guilty of murder in the first degree, and further found that he was armed with, and did use, a deadly weapon during the commission of this offense. Respondent was sentenced to life imprisonment.



On June 30, 1978, the California Court of Appeal for the First Appellate District modified and affirmed the judgment of conviction. On September 27, 1978, the California Supreme Court denied respondent's petition for hearing.

In 1985 and 1986, respondent filed petitions for writs of habeas corpus in, respectively and successively, the Sonoma County Superior Court, the Court of Appeal, and the California Supreme Court. The petitions were summarily denied. Copies of the supreme court's orders denying relief appear as Appendices D and E, respectively.

B. Federal Proceedings.

On November 12, 1987, respondent filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. The district

court issued an order to show cause on July 8, 1988, and denied the petition on December 9, 1988.

Upon respondent's appeal to the Court of Appeals for the Ninth Circuit, the court, on February 21, 1990, affirmed in part and reversed in part the judgment of the district court, with directions to consider the merits of respondent's federal claim. On May 25, 1990, the court of appeals denied rehearing and amended its opinion.

C. **Statement of the Facts**.

The opinion of the California Court of Appeal provides a summary of the events which led to respondent's conviction for the murder of his wife:

"In the afternoon of May 31, 1975 [respondent Owen Duane Nunnemaker] - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance



of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the [respondent] restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children, Linda (age 16 years), managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During the search, they discovered the [respondent] in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. [Respondent] offered no resistance and was placed under arrest and searched; several rounds of nine

(9) millimeter ammunition were found in [his] pocket; [respondent] led the officers to his car parked in front of the house where they observed the weapon used lying on the front seat.

"At trial, Linda, Sherry and Mrs. Brower testified that the [respondent] appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of [respondent] at the time of his arrest.

"The [respondent] testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly 'launched herself toward me.' Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave



him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. [Respondent] denied that he had intentionally shot his wife whom he loved deeply.

"The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony." (Appendix C, pp. 2-4; fns. omitted.)

**REASONS FOR GRANTING THE WRIT**

Relying upon an inapplicable dictum in *Harris v. Reed*, 109 S.Ct. 1038, 1044-1045, n.12 (1989), and misapprehending state law, the Ninth Circuit's opinion in this case has furnished state prisoners with a blueprint for circumventing state procedural rules and forum shopping

on federal issues. The Ninth Circuit's opinion permits a state prisoner whose procedural default has foreclosed state appellate redress to seek federal review of his claims by the simple expedient of first seeking state habeas corpus relief, which predictably would be denied without comment. In this manner a state prisoner in California could choose his forum, a choice which the Federal Habeas Corpus Act was intended to foreclose.

This case presents a stark example of a prisoner who, procedurally foreclosed from litigating a federal claim in state court, has been permitted to raise his claim in a federal forum without showing the cause and prejudice required by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Respondent Nunnemaker challenged his murder conviction in the California Court of Appeal on the ground that his statement to a prosecution psychiatrist was elicited in



violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court of appeal refused to address this claim in obedience to the legislative prohibition against considering evidentiary claims not raised at trial. The California Supreme Court denied a petition for hearing.

Almost a decade later, respondent again challenged the admissibility of the statement, this time by way of state habeas corpus. The supreme court twice denied habeas petitions on this ground, the second time without comment or citation to authority. The Ninth Circuit held that the second denial was a rejection of the merits of respondent's *Miranda* claim and that it served to forgive a procedural default which the court of appeal had expressly invoked ten years earlier.

The Ninth Circuit's opinion was founded not upon logic or precedent but upon its ignorance of state law. It

is a time-honored principle of California habeas corpus procedure that a denial without comment or case citation of habeas relief by a court which otherwise has jurisdiction is not a decision on the merits. When a petition for writ of habeas corpus is presented to the seven Justices of the California Supreme Court, each may have a separate reason for declining to issue the writ. When the supreme court denies habeas relief in the exercise of its original jurisdiction, it is not a determination of the merits of the petitioner's allegations.

Relying upon dictum in *Harris* v. *Reed*, 109 S.Ct. at 1038, 1044-1045 n. 12, the Ninth Circuit suggested that a California court could avoid the presumption that its denial of habeas relief reflected a decision on the merits by an express statement that "relief is denied for reasons of procedural default." The court's suggestion is based



upon one of two premises. The first is that a denial of habeas relief without comment or case citation is a resolution of the merits. As we have already stated, this premise is simply incorrect as a matter of state law. The alternative premise is that the Federal Habeas Corpus Act requires such a presumption. Nothing in *Harris*, or in any other decision of this Court, requires such a sweeping change in Federal Habeas Corpus procedure.

*Harris* made clear that a procedural default in state court bars federal habeas consideration of a federal claim if "the last state court rendering a judgment in the case ""clearly and expressly"" states that its judgment rests on a state procedural bar." 109 S.Ct. at 1043. The *only* state *judgment* in this case -- the opinion of the court of appeal which affirmed respondent's conviction on direct review -- expressly and exclusively rested its rejection of

respondent's *Miranda* claim upon his failure to raise the issue at trial.

Under the Ninth Circuit's opinion, a state prisoner who has failed, either inadvertently or intentionally, to raise an issue at trial or on direct appeal no longer need fear the forbidding test of cause and prejudice erected by *Wainwright* v. *Sykes*. To open the doors of federal court, he need only file a petition for writ of habeas corpus in the state supreme court. If that court denies relief without comment, as the California Supreme Court does hundreds of times each year, that denial will serve both to exhaust state remedies and to forgive the procedural default. To avoid such cynical manipulation of the post-conviction remedies provided by the state and federal systems, the state supreme court must alter its procedures drastically, providing an explanation for the denial of



relief. That would place an intolerable strain upon the resources of this state's highest court.

It is no exaggeration to state that the lower court's opinion, if allowed to stand, will serve to eviscerate the salutary rule of *Wainwright* v. *Sykes* in this and all other states which permit their supreme courts to manage their dockets by summarily denying habeas corpus relief. Such a result was neither dictated nor authorized by *Harris*, is in conflict with other Circuits, and is unnecessary to provide access to federal courts prisoners who have in good faith attempted to comply with state procedural rules. In view of the national importance of this issue, we believe that the need for review by this Court is manifest.

## ARGUMENT

### I.

### THE SUMMARY DENIAL OF HABEAS CORPUS BY THE CALIFORNIA SUPREME COURT WAS NOT A DECISION ON THE MERITS WHICH FORGAVE THE PROCEDURAL BAR UPON WHICH THE COURT OF APPEAL RELIED WHEN IT REFUSED TO CONSIDER RESPONDENT'S FEDERAL CLAIM.

Convicted in 1977 of the murder of his wife, respondent Nunnemaker appealed to the California Court of Appeal, asserting, *inter alia*, that he was not advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), before he was interviewed by a prosecution psychiatrist who later testified at his trial. Obedient to state procedural law (Cal. Evid. Code, § 353; *In re Dennis M.*, 70 Cal.2d 444, 461-462, 75 Cal.Rptr. 1 [1969]), the state appellate court held that "the failure to interpose an



objection during trial precludes our consideration on appeal." App. C at p. 11. The California Supreme Court denied his petition for hearing. Respondent then attempted to litigate his *Miranda* issue by way of state habeas corpus, filing petitions in the Sonoma County Superior Court, in the California Court of Appeal for the First District, and twice in the California Supreme Court. All petitions were denied without reference to the merits of the claim.

Respondent filed a petition for writ of habeas corpus in the federal district court, which found that respondent's procedural default in state court precluded federal review of his *Miranda* and (newly raised) Sixth Amendment claims. On appeal, the Court of Appeals for the Ninth Circuit reversed in part, holding that under this Court's decision in *Harris* v. *Reed*, the denial of habeas corpus

relief by the California Supreme Court, without comment or case citation, was a resolution of the merits of respondent's contention, which resolution forgave the procedural default invoked by the court of appeal a decade earlier. If the California Supreme Court intended to rely upon that procedural bar, the Ninth Circuit ruled, it could have and should have said so.

The flaw in this opinion is as easily identifiable as its consequences are grave. The Ninth Circuit has misapprehended California law, which holds that a summary denial of habeas corpus relief without comment or case citation is not a resolution of the question presented by petitioner. The Ninth Circuit's decision furnishes state prisoners with a blueprint for circumventing California's appeal procedure on federal questions. In short, the decision alters the balance carefully formulated



by this Court in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and its progeny.

**A. A Denial of Habeas Corpus Relief by a State Court Without Opinion or Case Citation is Not a Denial on The Merits.**

We begin by outlining California habeas corpus procedure. The writ of habeas corpus is guaranteed by the California Constitution (Art. I, § 11) and statute (Cal. Pen. Code, §§ 1473 *et seq.*). Although the supreme court and courts of appeal have original jurisdiction in habeas corpus proceedings (Cal.Const., Art. VI, § 10), a prisoner seeking such collateral review is expected to file his petition first in superior court, the court of general jurisdiction which has the power to hear evidence and resolve factual disputes. *See e.g., In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962). The petition is an application for a writ of habeas corpus; it must allege

the reason why the petitioner's imprisonment is illegal. Cal. Pen. Code § 1474; *People* v. *Pacini*, 120 Cal.App.3d 877, 883-884, 174 Cal.Rptr. 820 (1981). If the petition does not state facts which, if true, would entitle the petitioner to relief, the court must deny the petition. *Griggs* v. *Superior Court*, 16 Cal.3d 341, 347, 128 Cal.Rptr. 223 (1976); *In re Swain*, 34 Cal.2d 300, 304, 209 P.2d 793 (1949). If the petition does state a prima facie case for relief, the court then issues an order to show cause. *See In re Lewallen*, 23 Cal.3d 274, 278 n.2, 152 Cal.Rptr. 528 (1979); *In re Hochberg*, 2 Cal.3d 870, 873 n. 2, 87 Cal.Rptr. 681 (1970). The order to show cause directs the custodian to serve and file a written return, which must "plainly and unequivocally" "state the authority and cause of such imprisonment or restraint." Cal. Pen. Code § 1480. The return, which must be "responsive to the



grounds actually presented in the petition" (*People* v. *Green*, 27 Cal.3d 1, 43 n. 28, 164 Cal.Rptr. 1 [1980]), "functions analogously to a "'complaint in a civil proceeding"' in asserting grounds of legality and 'as to any factual allegations it makes."' *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. The petitioner then responds by filing a traverse in which he "may deny or controvert any of the material facts or matters set forth in the return. . . ." Cal. Pen. Code § 1484; *In re Saunders*, 2 Cal.3d 1033, 1047, 88 Cal.Rptr. 633 (1970). "The traverse, and the petition whereby stipulation or acquiescence it is treated as a traverse . . . are analogous to the answer in a civil proceeding. . . ." *Ibid.* "The issues are joined in this manner, and 'new matter set up in the petition [and traverse] which tends to invalidate the apparent effect of the process set forth in the return is

deemed denied and must be proved by the party alleging it, namely the petitioner.'" *Id.* at 1047-1048, 88 Cal.Rptr. 633.

If the petitioner "except[s] to the sufficiency" (Cal. Pen. Code, § 1484) of the return in his traverse, he has in effect raised questions of law by a procedure analogous to demurrer. By the same token, if the return acknowledges the allegations in the petition and traverse, relief may be granted without a hearing if those allegations justify such action. *In re Saunders*, 2 Cal.3d at 1048, 88 Cal.Rptr. 633; *In re Masching*, 41 Cal.2d 530, 533, 261 P.2d 251 (1953). If the issue is not the legal significance of undisputed allegations, but the existence of disputed facts, the superior court may compel the attendance of witnesses and to "do and perform all other facts and things



necessary to a full and fair hearing and determination of the case." Cal. Pen. Code § 1484.

If the superior court denies relief, the petitioner has no right to appeal the denial. He must file a new petition in either the court of appeal or the supreme court. *Gardner* v. *California*, 393 U.S. 367, 368 (1969); *In re Crow*, 4 Cal.3d 613, 621 n. 8, 94 Cal.Rptr. 254 (1971). With one exception, the rules of pleading and proof delineated above are generally applicable to appellate courts. The supreme court and courts of appeal have no power to find facts. If a petition and return generate a factual conflict, the appellate court will appoint a referee to hold a hearing and make findings and conclusions. *In re Egan*, 24 Cal.2d 323, 327, 149 P.2d 693 (1944). Alternatively, when the court of appeal issues an order to show cause, it may make it returnable before the superior

court, which will hold the hearing. *In re Hochberg, supra*, 2 Cal.3d at 873-874 n. 2, 87 Cal.Rptr. 681.

Should the court of appeal deny the writ of habeas corpus, the prisoner has two possible remedies. They theoretically are mutually exclusive and their existence depends upon the reason for the denial. If the court of appeal denies relief without opinion, the prisoner simply petitions for habeas corpus in the supreme court. Cal.Pen. Code § 1475; *In re Crow*, 4 Cal.3d at 621 n. 8, 94 Cal.Rptr. 254. If, however, the court writes an opinion which denies relief, an action necessitated by the issuance of an order to show cause and the filing of a return (*In re Mazoros*, 76 Cal.App.3d 50, 52-53, 142 Cal.Rptr. 609 (1977)), the prisoner should file a petition for review in the state supreme court. Cal. Pen. Code § 1506; Cal.



Rules of Court, rule 28; *In re Michael E.*, 15 Cal.3d 183, 193 n. 15, 123 Cal.Rptr. 103 (1975).

Habeas corpus generally will not lie to consider issues which were raised, or could have been raised, on direct review (*In re Terry*, 4 Cal.3d 911, 927, 95 Cal.Rptr. 31 (1971); *In re Waltreus*, 62 Cal.2d 218, 225, 42 Cal.Rptr. 9 (1965)), unless newly discovered facts or a change in the law merit reconsideration of the claim. *In re Bevill*, 68 Cal.2d 854, 863 n. 9, 69 Cal.Rptr. 599 (1968). Similarly, a contention which has been raised and rejected in a prior application for habeas corpus will not be reconsidered. *In re Lynch*, 8 Cal.3d 410, 439 n. 26, 105 Cal.Rptr. 217 (1972); *In re Miller*, 17 Cal.2d 734, 735, 112 P.2d 10 (1941).

Finally, and most importantly, we explain the consequences of a summary denial of a writ of habeas

corpus such as that issued by the California Supreme Court upon respondent's second application for habeas relief. The California Constitution requires that "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal.Const., Art. VI, § 14. Because a summary denial is without opinion, it cannot be a determination of a "cause" within the meaning of the state constitution. *See People* v. *Medina*, 6 Cal.3d 484, 490, 99 Cal.Rptr. 630 (1972); *Myers* v. *Ylst*, 897 F.2d 417, 426-428 (9th Cir. 1990) (diss.opn.). For this reason a summary denial of a habeas petition does not establish the law of the case. *People* v. *Pacini*, 120 Cal.App.3d at 884, 174 Cal.Rptr. at 826. It is not a judgment which conclusively and definitively establishes the rights and obligations of the parties. To give such preclusive effect to a summary



denial would violate the California Constitution. The Ninth Circuit's opinion has, in effect, accused the California Supreme Court of habitually violating its own charter.

**B. The Denial by The California Supreme Court of Respondent's Habeas Corpus Petition Was Not a Resolution of His Federal Claim; *Harris* v. *Reed* Does Not Require a Contrary Rule.**

**(1)**

The foregoing principles, to which the Court of Appeals for the Ninth Circuit made no reference, explain the denials of habeas corpus by the California Supreme Court. Most of the contentions made by respondent in his petition for writ of habeas corpus had been raised in his direct review. Habeas corpus will not lie to relitigate claims that were raised, or could have been raised, on appeal. *In re Waltreus, supra,* which the supreme court cited in its first minute order (App. D), stands for this

proposition. In his habeas petition, respondent also challenged the admissibility of the testimony of "emotionally disturbed children," (*see* App. B at 7), a claim which was not raised on appeal. The supreme court then addressed that contention with its citation of *In re Swain, supra*, which holds that "vague, conclusionary allegations . . . are insufficient to warrant issuance of the writ," but its denial "is not a ruling on the merits. . . ." 34 Cal.2d at 303-304, 209 P.2d at 793. Thus, relief could not be granted unless petitioner explained his contention with sufficient particularity and, in addition, disclosed the reasons for delaying in the presentation of those facts. This denial did not forgive the procedural bar invoked by the state court of appeal eight years earlier when it declined to consider respondent's *Miranda* claim.



After the district court, understandably uncertain whether respondent had exhausted his state remedies, dismissed his first petition for federal habeas corpus for failure to show exhaustion, respondent returned to state court, filing a second petition for habeas corpus in the state supreme court. That court denied relief without comment or case citation. That order is the source of the controversy between the parties. Based upon the rules of practice governing state habeas corpus procedure, we may confidently state that the supreme court denied respondent's second petition because it had denied the first petition and respondent had alleged no new facts which would have required the court to reconsider his claims. The Ninth Circuit's failure to grasp this elementary principle of state habeas corpus procedure

constituted plain error; that is not why we seek review by this Court, however.

A federal court reviewing a California conviction is not required to decipher summary denials of habeas corpus in order to determine their legal basis. Rather, it need only remember one overarching principle: A summary denial of habeas corpus, even with a case citation, is not a "judgment" which in any way replaces or supplants an opinion of an appellate court affirming a criminal conviction. The last state court rendering a judgment in this case was the court of appeal which refused to consider respondent's *Miranda* claim by reason of his procedural default at trial. A subsequent summary denial of habeas relief by a California state court is not a judgment which forgives the procedural bar. The Ninth Circuit's disregard of the well-established principle



potentially sets at large every conviction affirmed by an appellate court which had invoked a procedural bar in declining to consider a federal claim. That is why we seek certiorari.

We reiterate that the Ninth Circuit's opinion does violence to state law. A carefully reasoned opinion of the California Supreme Court which invokes a procedural default on direct review would be supplanted by a casual minute order of a superior court denying relief without comment. If the court of appeal and supreme court also summarily deny relief, a procedural bar miraculously is transformed into a decision on the merits. *But cf. Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989). Indeed, even if the superior court denies relief in a written opinion which invoked a procedural bar, a one-line denial by the state court of appeal and supreme court will also produce

this transformation. *But cf. Harmon* v. *Barton*, 894 F.2d 1208 (11th Cir. 1990); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989).

(2)

But, the Ninth Circuit explains, *Harris* v. *Reed, supra*, compels this result. As the Ninth Circuit views the matter, a denial of habeas relief without comment or case citation is conclusively presumed to be a judgment on the merits, forgiving any procedural default upon which state courts had previously relied in denying relief. The Ninth Circuit's view of *Harris* is unsupported by the holding or reasoning of that decision.

In *Harris,* the prisoner filed a petition for post-conviction relief in Illinois courts, raising a contention which he had not asserted on direct appeal. The Circuit and Appellate Courts denied relief, the latter court



ambiguously noting a procedural default but also addressing the merits of the contention in the course of a seven-page opinion. This Court held that the federal claim could be raised on federal habeas corpus in the absence of a "plain statement" that the state courts relied upon the procedural bar as an independent basis for its disposition of the case. This court stated: "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar." 109 S.Ct. at 1043.

This case is markedly different from *Harris* because respondent did raise the *Miranda* claim on direct appeal. The court of appeal expressly and exclusively rested its disposition of the claim upon respondent's failure to

object at trial. Thus, the "last state court rendering a judgment" based its decision exclusively on procedural grounds.

The Ninth Circuit's insistence that the California Supreme Court was the last state court to render judgment is based upon this Court's dictum, responding to Justice Kennedy's well-founded concerns (*Id.* at 1050 n.1), that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'" *Id.* at 1044-1045 n. 12. Such a rule may be necessary in, and should be confined to, cases in which the federal claim is raised for the first time on state habeas corpus. Were the rule otherwise, a federal habeas court would be left



without a clue why relief was denied.[1/] But when, as here, an opinion expressly relies upon a procedural default to deny relief, it is senseless to presume that a summary denial forgave a procedural default. Then, Justice Kennedy's prediction will surely come to pass: "[P]risoners whose claims otherwise would be procedurally barred now have every incentive to burden state courts with a never-ending stream of petitions for post-conviction

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1. The Ninth Circuit's presumption that an unexplained denial by a state court of habeas relief finds its genesis in *Harris* v. *Superior Court*, 500 F.2d 1124 (9th Cir. 1974), which held that the California Supreme Court's summary denial of a state habeas petition is a decision on the merits for purposes of *exhaustion*. Such a rule is a necessary fiction created to avoid a waste of the prisoner's time in attempting to comply with the exhaustion requirement. *See Thompson* v. *Procunier*, 539 F.2d 26, 28 (9th Cir. 1976). This presumption may also be necessary in the procedural default context but only when *no* state court has written an opinion explaining to the petitioner why it was denying his petition. That is the apparent basis for *Harris* v. *Reed*. But when, as here, an opinion of a state court clearly explains the procedural basis for the rejection of the federal claim, this amiable fiction is, at best, unnecessary and, at worst, pernicious.

relief. Such perseverance may, in due course, be rewarded with a suitably ambiguous rebuff, perhaps a one-line order finding that a prisoner's claim 'lacks merit' or stating that relief is 'denied.'" *Id.* at 1054. In the context of a case such as this one, the crowning irony is that the "ambiguous rebuff" will serve to forgive a procedural bar upon which the appellate court had based its opinion. It is no exaggeration to say that the Ninth Circuit's opinion makes state procedural rules unenforceable.

Nor can all of the foregoing be avoided as easily as the Ninth Circuit apparently believes. An order by the state supreme court denying relief "for reasons of procedural default" would solve the problem, but that is easier said than done. As we explained, California Supreme Court habeas corpus jurisdiction has always been



wholly discretionary.[2/] Each Justice may have his or her own reasons for denial: a lack of merit, a failure to exhaust, a failure to object at trial, a failure to object on appeal, a failure to plead with sufficient particularity. In addition, many, if not most, habeas petitions contain more than one claim, each of which may be denied for different reasons by each Justice. The inescapable result -- one surely not intended by this Court -- would be to require the California Supreme Court to decide each claim in each habeas petition on a ground upon which a majority of the Justices concur. The supreme court cannot

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2. Supreme Court of California, Practices and Procedure (1990 Rev.) at 12, 13.

increase its workload by 800 cases[3/] to vindicate the Ninth Circuit's untenable concept of procedural default.

Reflection upon this problem discloses an additional complication. If three Justices deny habeas relief on procedural grounds and one Justice votes to deny solely for failure to state a prima facie case for relief, the Ninth Circuit's opinion provides absolutely no guidance to decide whether the denial was for substantive or procedural reasons. Reference to the last state court opinion will avoid this needless difficulty.

In this case, the only state court opinion invoked, rather than forgave, respondent's procedural default. It is unnecessary to look beyond that opinion for the reason why state courts have rejected his federal claim.

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3. In fiscal year 1988-89, 837 original petitions for writ of habeas corpus were filed in the California Supreme Court. 2 Judicial Council of California, 1990 Annual Report, at 24.



Respondent should be barred from federal habeas corpus relief.

### C. The Ninth Circuit's Opinion is in Conflict With Other Cases Construing *Harris* v. *Reed*.

The opinion of the Ninth Circuit is at odds with the decisions of other Circuits, which instead support our view of *Harris*. Those courts hold that a procedural default by a state prisoner is presumed forgiven unless a state court, at some stage of the proceedings in the state review of the conviction, expressly relies upon the default to deny relief. Silence by the state courts will not satisfy *Harris*. *See e.g., Durosko* v. *Lewis*, 882 F.2d 357 (9th Cir. 1989); *Edwards* v. *Butler*, 882 F.2d 160 (5th Cir. 1989); *Booker* v. *Lynaugh*, 872 F.2d 100 (5th Cir. 1989). However, when a state court writes an opinion which expressly denies relief for failing to comply with state procedure, subsequent summary denials of relief will not transform the

procedural bar into a rejection of the merits of the federal claim. *See e.g., Harmon* v. *Barton*, 894 F.2d 1268 (11th Cir. 1990); *Russell* v. *Lynaugh*, 892 F.2d 1205 (5th Cir. 1989); *Arce* v. *Smith*, 889 F.2d 1271 (2d Cir. 1989); *Ellis* v. *Lynaugh*, 873 F.2d 830 (5th Cir. 1989).

*Russell* v. *Lynaugh* is squarely contrary to the present case in both reasoning and result. There the prisoner had claimed on direct appeal in the Texas Court of Criminal Appeals that three potential jurors were improperly excluded. The state court rejected the contention on the ground that the prisoner had made no objection at trial. 892 F.2d at 1209. He then petitioned for state habeas corpus, contending that a potential fourth juror had been improperly removed. The trial court denied relief, citing the opinion of the court of appeals, and that court also denied habeas corpus in an unwritten order. *Ibid.*



The Fifth Circuit found that the state court disposition satisfied the *Harris* "plain statement" rule. It held that the opinion of the Texas Court of Appeals was the expression of "the last court rendering judgment," and decisively rejected the argument that the later unwritten order of that court was the last judgment. "We think that this overly technical argument fails to detract from the unambiguous expression of the Texas Court of Criminal Appeals. On each occasion that the dismissal of a *Witherspoon* juror was raised, the procedural bar was, in fact, applied on the grounds precisely present in the [fourth juror] claim: no objection to the venireperson had been raised at trial." *Id.* at 1210. "Nor is the simple denial of the petitioner's rerun of the identical claims on habeas any basis to ignore the clear and express rulings of the Texas appellate court. Indeed, we unhesitatingly read

this disposition of the habeas claims as a clear and express reliance upon the earlier, fully articulated rulings applying the procedural bar. . . . The 'plain statement' rule does not require that the state court regurgitate the words of its earlier clear and express rulings every time identified issues are resubmitted to that court in the same case." *Id.* at 1210-1211.

*Russell* stands for the unassailable proposition that a procedural bar erected by an appellate court on direct review does not fall under compulsion of *Harris* when habeas relief is subsequently denied without comment. A federal habeas court confronted with such unexplained denials need not examine state law or study the record to determine whether a procedural default was the reason for the denial of the federal claim. Reference to the last state court opinion containing a "plain statement"



"achieves the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it." *Harris* v. *Reed*, 109 S.Ct. at 1044; *Russell* v. *Lynaugh*, 892 F.2d at 1211.

In attempting to harmonize its holding with two other irreconcilable cases -- *McQuown* v. *McCartney*, 795 F.2d 807 (9th Cir. 1986), and *Ellis* v. *Lynaugh, supra* -- the Ninth Circuit purported to discern a distinction between an appellate affirmance of a trial court denial of habeas corpus, which the court said is not a decision on the merits, and a summary denial of an original habeas petition, which the court declared is a resolution of the federal claim. App. A at 5368 n. 4, 5369 n. 5. Such a gossamer distinction is neither required by *Harris* nor faithful to the concept of state-federal comity which section 2254 is intended to vindicate. *Harris* requires only

that the last opinion of the state courts contain a plain statement that a procedural bar was invoked to deny relief. The record in this case contains such an opinion.

More fundamentally, the opinion in this case will arrogate to the Ninth Circuit the power to "micromanage" the docket of the California Supreme Court. *Cf. Myers* v. *Ylst*, 897 F.2d at 426 (dis. opn.). It will permit the Ninth Circuit to ignore clearly worded appellate opinions and instead examine the summary dispositions of the supreme court for the purpose of deriving their meaning. If the order in question denies review, the Ninth Circuit will ascribe no significance to it, presumably even if the state court cites a case which indicates a rejection of the merits of the petitioner's claim. However, if the order denies habeas relief, it becomes potentially significant, and citations to cases will require deciphering. In short, this



opinion commissions federal district courts as cryptographers of state summary orders which deny post-conviction relief. It is difficult to imagine a more intrusive inquiry into state procedures, one that is not authorized by *Harris*, not desirable in terms of comity concerns, and clearly not necessary.

Furthermore, the distinction created by the Ninth Circuit between denial of habeas relief and denial of review is wholly illusory, as the court itself cryptically acknowledged by reserving this issue for another day. App. A at 1842-1843 n.4. Until that time, a prisoner determines the nature of the disposition which he receives from the California Supreme Court by his denomination of the pleading. If he is wily enough to call it a petition for writ of habeas corpus, he has assured his access to

federal court. It is irrational to confer such power upon a litigant.

The state court of appeal invoked a procedural bar against respondent's *Miranda* claim in 1978. Under state law and *Harris* v. *Reed*, only a subsequent opinion, not a silent order, can forgive that default. To the extent that it holds otherwise, the Ninth Circuit's opinion must be reversed.



## CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Court be granted.

DATED: July 5, 1990

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# APPENDICES

# APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| Owen Duane Nunnemaker,<br>Petitioner-Appellant,<br><br>v.<br><br>Eddie S. Ylst<br>Respondent-Appellee. | No. 89-15050<br>D.C. No.<br>CV 88-1828 TEH<br><br>ORDER AND<br>AMENDED<br>OPINION |

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Submitted November 17, 1989*/
San Francisco, California

Filed February 21, 1990
Amended May 25, 1990

Before: Jerome Farris, Harry Pregerson and
Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Pregerson

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SUMMARY

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**HABEAS CORPUS**

Affirming in part and reversing in part a judgment of the district court, the court held that a state procedural default bars federal habeas corpus review only if the last

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*. The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

state court clearly and expressly states that its judgment rests on a state procedural bar.

Petitioner California State prisoner Owen Nunnemaker appealed the district court's dismissal of his petition for habeas corpus filed under 28 U.S.C. § 2254. A jury convicted Nunnemaker of first degree murder. At trial, defense counsel made specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights. On direct appeal, Nunnemaker raised these federal constitutional challenges for the first time. Affirming the conviction, the state appellate court expressly avoided these challenges and held that failure to interpose an objection during trial precluded consideration on review. The California Supreme Court denied Nunnemaker's petition for hearing without comment or case citation. After Nunnemaker's habeas corpus petitions were denied by the state courts, the district court also denied his habeas petition because it did not make clear that he had exhausted all state remedies. Nunnemaker then filed a second petition for habeas relief in the California Supreme Court, and that petition was denied. The district court



denied Nunnemaker's second petition holding that his state procedural default barred review of the Fifth and Sixth Amendment challenges to the psychiatrist's testimony.

[1] Under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct 1038 (1989), a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone will not bar federal review; the state court's ruling must have been based at least in part on an adequate and independent state procedural rule. [2] In this case, the California Supreme Court was the last state court to render judgment. From the record before it, the Court could not say that the California Supreme Court's denial of Nunnemaker's final petition, without cause or comment, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris* require that where a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal review is not precluded.

[3] Because Nunnemaker did show that his trial counsel's performance was not within the range of

competence demanded of attorneys in criminal cases, the court affirmed that part of the district court's ruling.

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**COUNSEL**

Juliana Drous, San Francisco, California, for the petitioner-appellant.

Ronald E. Niver, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

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**ORDER**

The opinion is *Nunnemaker v. Ylst*, No. 89-15050, slip op. (9th Cir. Feb. 21 1990), is amended as follows:

*Slip op. at 1842, line 12*

The sentence beginning with "Here, the California Supreme Court" is deleted and replaced by the following sentence:

Here, the California Supreme Court was the "last state court to render judgment in the case" because Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.

*Slip op. at 1842, footnote 4*



The first sentence in the footnote is deleted. The following sentence is added after the last sentence in the footnote:

Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

*Slip op. at 1843, footnote 5*

The original footnote is deleted and replaced by the following footnote:

In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied,* ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily *affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition. See* Tex. Crim. Proc. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh,* 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*,

we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh.*

The panel has voted to deny the petition for rehearing and to reject the suggestion of rehearing en banc. The full court has been advised as to the suggestion of rehearing en banc, and no judge has requested a vote on en banc consideration.

The petition for rehearing is DENIED and the suggestion of rehearing en banc is REJECTED.

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**OPINION**

PREGERSON, Circuit Judge:

Owen Duane Nunnemaker, a California state prisoner, appeals the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. A California jury convicted Nunnemaker of first degree murder under Cal. Penal Code § 187. At trial, a psychiatrist called by the state prosecutor gave testimony on statements made by Nunnemaker in a post-arrest interview. Nunnemaker contends that the admission of the psychiatrist's testimony violated his Fifth and Sixth Amendment rights, that his Fifth and Sixth Amendment claims are not barred by procedural default, and that he received ineffective assistance of counsel. In light of the



Supreme Court's recent decision in *Harris v. Reed,* ___ U.S. ___, 109 S.Ct. 1038 (1989), decided after the district court ruled on Nunnemaker's petition, we reverse in part and remand the case to the district court for consideration of Nunnemaker's Fifth and Sixth Amendment challenges to his conviction. We affirm the district court's judgment that Nunnemaker was not deprived to effective assistance of counsel.

**BACKGROUND**

On January 30, 1976, Owen Duane Nunnemaker was convicted in California state court of first degree murder. He was sentenced to life in prison.

At trial, Nunnemaker introduced expert testimony to establish capacity defense then available under California law. To rebut this testimony the state prosecutor called as a witness a psychiatrist who interviewed Nunnemaker two days after his arrest. At the time of the interview, Nunnemaker was told that the psychiatrist was working for the prosecution. Nunnemaker, however, was not informed that he had the right to remain silent and the right to an attorney. At trial, defense counsel made several specific objections to certain statements made by the state's psychiatrist, but failed to challenge the entire testimony on the grounds that it was based on an interview

conducted in violation of Nunnemaker's Fifth and Sixth Amendment rights.

On direct appeal to the California Court of Appeal, Nunnemaker raised for the first time his federal constitutional challenges to the testimony of the state's psychiatrist. Affirming the conviction, the state appellate court expressly avoided these challenges and held that "the failure to interpose an objection during trial preclude[d its] consideration on review." The state appellate court, however, considered on the merits -- and rejected -- Nunnemaker's ineffective assistance of counsel claim. On direct appeal, the California Supreme Court denied Nunnemaker's petition for hearing, without comment or case citation, on September 27, 1978.

Nunnemaker petitioned the California courts for a writ of habeas corpus. In his habeas petitions, he raised, among other claims, his federal constitutional challenges to the testimony of the state psychiatrist and his ineffective assistance of counsel claim. His petitions were denied.[1/]

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1. The Sonoma County Superior Court denied Nunnemaker's petition on February 25, 1985. The California Court of Appeal for the First Circuit denied his petition in late 1985. The California Supreme Court denied his first petition on December 3, 1986, and his second petition on April 7, 1988.



Nunnemaker then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Northern District of California. The district court dismissed the petition without prejudice because the petition did not make clear whether all state remedies had been exhausted.[2/] Nunnemaker filed a second petition for

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2. The district court stated:

> The petition is not entirely clear as to the procedural history of this matter. Petitioner states that none of his claims were raised by way of direct appeal in the California courts. However, petitioner did present these and other claims to the California Court of Appeal and Supreme Court by way of a habeas petition. The California Supreme Court denied the petition, citing *In Re Waltreus,* 62 Cal.2d 218, 225 (1965) and *In Re Swain*, 34 Cal.2d 300, 304 (1949). These citations are cryptic. *Walthus* holds that arguments rejected on appeal will not be reviewed again in habeas; thus the implications of this citation contradict petitioner's assertion that he did not raise the claims on appeal. *Swain,* in contrast, holds that habeas claims not pleaded with sufficient particularity must be dismissed without prejudice. This latter citation implies that at least some of petitioner's claims were not presented on appeal, and the California Supreme Court declined to consider their merits on procedural grounds.

habeas relief in the California Supreme Court, arguing again that his statements to the state prosecution psychiatrist were "clearly inadmissible," and stating in greater particularity his claim of ineffective assistance of counsel. That petition was also denied, without comment or case citation, by the California Supreme Court on April 7, 1988.

Nunnemaker filed another federal habeas petition. The district court issued an Order to Show Cause on July 8, 1988. On December 9, 1988, the district court denied the petition. The court held that Nunnemaker's state procedural default barred review of the Fifth and Sixth Amendment challenges to the prosecution's psychiatrist testimony, and that Nunnemaker had not been deprived of effective assistance of counsel.

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> As to any claims raised on appeal to the state and rejected on the merits, petitioner has exhausted his state remedies and this court can hear his habeas petition.... However, any claims not raised on appeal, and whose merits the state courts have not considered on habeas, must be dismissed....

District Court Ordered, September 8, 1987, at 2.



Nunnemaker filed a timely notice of appeal. This court has jurisdiction over the district court's final order under 28 U.S.C. § 2253.

## STANDARD OF REVIEW

We review the district court's denial of habeas corpus relief de novo. *McKenzie v. Risley*, 842 F.2d 1525, 1531 (9th Cir.) (en banc), *cert. denied*, 109 S.Ct. 250 (1988). The question whether Nunnemaker was deprived of effective assistance of counsel is a mixed question of fact and law reviewed de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Deutscher v. Whitley*, 884 F.2d 1152, 1155 (9th Cir. 1989).

## DISCUSSION

### I. Procedural Bar

This case presents the issue whether the California Supreme Court's denial of an original petition for writ of habeas corpus without comment or case citation constitutes a "plain statement" sufficient to establish the procedural default bar of federal habeas review under the Supreme Court's recent decision in *Harris v. Reed*, 109 S.Ct. 1038. We hold that it does not.

The Supreme Court has held that a state prisoner barred by procedural default from raising a federal constitutional claim in state court "could not litigate that

claim in a § 2254 habeas corpus proceeding without showing cause for and actual prejudice from the default." *Engle v. Isaac*, 456 U.S. 107, 110 (1982) (citing *Wainwright v. Sykes*, 433 U.S. 72 (1977)). In *Harris v. Reed*, the Supreme Court applied this rule, but held that "a federal claimant's [state] procedural default precludes federal habeas review . . . only if the *last* state court rendering a judgment in the case rests its judgment on the procedural default." 109 S.Ct. at 1043 (emphasis added.) The Court explained that *Wainwright v. Sykes'* holding that a state procedural default may bar federal habeas review is based on the adequate and independent state ground doctrine, under which the Court "will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Id.* at 1042 (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 20 Wall. 590, 635-36 (1875)). The Court in *Harris* applied the "'plain statement' rule" of *Michigan v. Long*, 436 U.S. 1032, 1042 and n.7, to state prisoner cases on federal habeas review, and held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last



state court rendering judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)).

[1] Under *Harris*, then, a procedural default bars review in federal habeas proceedings only if the last state court ruling on a case states the basis of its decision. Procedural default alone does not bar federal review; the state court's ruling must have been *based*, at least in part, on an "adequate and independent" state procedural rule. *Harris v. Reed*, 109 S.Ct. at 1042. *Harris* undertakes to resolve the problem -- often faced by district courts -- of discerning from an ambiguous state court ruling the basis of a decision to deny habeas relief to a state prisoner raising federal constitutional claims. The plain statement requirement ensures that federal courts will decline to review state prisoners' federal constitutional claims only where required by the interests of comity.[3]

[2] Here, the California Supreme Court was the "last state court to render judgment in the case" because

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3. Where comity does not require it, federal courts should not deny review. "[T]he federal courts . . . have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution." *Harris v. Reed*, 109 S.Ct. at 1045 (Stevens, J., concurring).

Nunnemaker's last filing with that court was an *original habeas petition* raising again his Fifth Amendment challenge to the state psychiatrist's testimony.[4] That court did not clearly and expressly state its reliance on Nunnemaker's procedural default when it denied his final habeas petition. The petition raised Nunnemaker's objection to the testimony of the state's psychiatrist and Nunnemaker's ineffective assistance of counsel claim. From the record before us, we cannot say that the California Supreme Court's denial of Nunnemaker's final petition, without comment or case citation, was based on a procedural default rather than on the underlying merits of Nunnemaker's claims. The rationale and plain language of *Harris*, require that, where, as here, a state supreme court does not plainly state in its summary denial of an original habeas petition that its ruling rests on a state procedural bar, federal habeas review is not precluded.[5]

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4. Under California law, a state prisoner seeking collateral review of his or her conviction may file separate, independent habeas petitions in the superior court, court of appeal, and supreme court. Cal. Penal Code § 1475. In addition, however, a state prisoner whose habeas petition is denied in the court of appeal may file a petition for review of that denial in the California Supreme Court. Cal. Penal Code § 1506. In *McQuown v. McCartney*, 795 F.2d 807, 809-10 (9th Cir. 1986), we held that when a habeas case is before the California Supreme Court on a *petition for hearing*, rather than as an *original habeas petition*, a summary denial by the state supreme court is not a decision on the merits of the petition. *See also Tacho v. Martinez*, 862 F.2d 1376, 1378-80 (9th Cir. 1988) (applying *McQuown* and holding that the Arizona Supreme Court's *denial of review* of a trial court denial of habeas relief without case citation or comment was not a decision on the merits.) *Cf. Thompson v. Procunier*, 539 F.2d 26, 28 (9th Cir. 1976) ("Where a petition for a writ of habeas corpus presenting a federal constitutional question is denied by a state court with no reason given, we will assume that the state court has had an opportunity to pass upon the merits of the issue and has resolved it against the petitioner.").

*McQuown* does not affect the present case, because the California Supreme Court denied Nunnemaker's *original habeas petition* on April 7, 1988. That ruling was a "judgment" under *Harris*, and was the last rendered by a state court in Nunnemaker's case. We do not now address the question whether, in light of *Harris v. Reed*, the California Supreme Court's summary denial of a *petition for hearing* on a denial of habeas relief based on a procedural rule bars federal habeas review. Our holding is expressly limited to cases in which the California Supreme Court denies, without comment or case citation, original habeas petitions.

5. In *Ellis v. Lynaugh*, 873 F.2d 830, 838 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 419 (1989), the Fifth Circuit held that, where a state trial court denied habeas relief on state procedural default grounds but the appellate court "denied relief without written order," federal review of the petitioner's claims was barred by the procedural default. It is not clear, however, whether the state appellate court in *Ellis v. Lynaugh* summarily

In fact, the Supreme Court discussed in *Harris* the issue now before us. The Court addressed concerns raised over the burden the plain statement requirement would place on state courts ruling on habeas petitions. The Court stated that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of a procedural default.'" *Harris v. Reed*, 109 S.Ct. at 1044 n.12. The California Supreme Court did not do that in this case.

The district court carefully reviewed Nunnemaker's habeas petitions, but did not have the benefit of the Supreme Court's later clarification of federal habeas law in *Harris*. We hold that the district court was not barred from reviewing Nunnemaker's federal constitutional claims concerning the testimony of the state's psychiatrist.

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*affirmed* the trial court's denial of habeas relief on petition for review, *see* Tex. Crim. Proc. Code Ann. § 4.04.2 (1987), or denied an *original habeas petition*. *See* Tex. Crim. Code Ann. § 4.04.1 (1987); *see also Ellis v. Lynaugh*, 873 F.2d at 838. Because our decision in this case rests on the fact that the California Supreme Court summarily denied Nunnemaker's *original habeas petition*, we express no opinion on the Fifth Circuit's decision in *Ellis v. Lynaugh*.



**II. Ineffective Assistance of Counsel**

Nunnemaker also contends that he was deprived of effective assistance of counsel, and that federal habeas relief should be granted for that reason.[6/] This Sixth Amendment ineffective assistance of counsel claim is based on Nunnemaker's trial counsel's failure to object to the admission of the state psychiatrist's testimony on Fifth and Sixth Amendment grounds. The district court concluded that "[d]efense counsel was clearly acting as the 'counsel' guaranteed by the Sixth Amendment." We agree.

An ineffective assistance of counsel claim has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984). A convicted defendant complaining of the ineffectiveness of counsel's assistance must show that counsel's

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6. Nunnemaker raised this claim on direct appeal in the state court proceedings, and the state appellate court decided the merits of the claim. The state has made no argument that this claim was not properly before the district court. The district court correctly reached the ineffective assistance claim in the its review of Nunnemaker's habeas petition.

representation "fell below an objective standard of reasonableness." *Id.* at 688.

The trial record demonstrates that Nunnemaker's counsel vigorously objected to parts of the psychiatrist's testimony on various grounds. Further, because the state's psychiatrist was subject to potentially damaging cross examination, trial counsel's decision to allow the testimony, make specific objections, and impeach the witness on bias and credibly grounds may well have been a sound trial tactic.[7]

[3] Nunnemaker has not shown that his trial counsel's performance "was not 'within the range of competence demanded of attorneys in criminal cases.'" *Id.* at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).

**CONCLUSION**

For these reasons, the judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part.

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7. This was the conclusion reached by the state appellate court on direct appeal.



**APPENDIX B**

**FILED: December 9, 1988**
**William L. Whittaker**
**Clerk, U.S. District Court**
**Northern District of California**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OWEN DUANE NUNNEMAKER
Petitioner,
v.
EDDIE YLST,
Respondent.

No. C-88-1828 TEH
**ORDER**

This matter comes before the court on petitioner's petition for a writ of habeas corpus. After being convicted of first degree murder, petitioner was confined to the California Medical Facility at Vacaville. Petitioner contends that he is unlawfully confined because 1) statements he made to a prosecution psychiatrist were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and were erroneously admitted at trial, 2) his attorney was incompetent for failing to object to the introduction of the psychiatrist's testimony, 3) the evidence introduced at trial was insufficient to support a verdict of first degree murder, and 4) the prosecutor's actions constituted prejudicial misconduct. Having reviewed the

papers and the record in this case and good cause appearing, the petition is denied for the reasons set forth below.

DISCUSSION

I. Whether this Court is Barred from Reviewing Petitioner's Claim that his Statements to a Prosecution Psychiatrist were Erroneously Admitted.

Under California law, the failure to make a specific and timely objection at trial to the testimony of a prosecution psychiatrist who examined the defendant without admonishing him of his rights under Miranda, bars the issue from later appeal. People v. Bennett, 60 Cal.App.3d 112, 116 (1976). In petitioner's case, defense counsel objected to certain statements made by the prosecution psychiatrist, but failed to raise the issue that the entire testimony was based on an interview which violated petitioner's rights under Miranda and the fifth and fourteenth amendments. Consequently, this issue was never raised on appeal to the California Court of Appeals or the California Supreme Court.

Federal courts require that a state prisoner exhaust the remedies available in state courts before presenting a habeas corpus claim for federal review. 28 U.S.C. Sections 2254(b),(c); Rose v. Lundy, 455 U.S. 509 (1982); McNeeley v. Arave, 842 F.2d 230, 231 (9th Cir. 1988).



The purpose of the exhaustion requirement is to provide the highest state court with a fair opportunity to rule on the merits of each and every issue petitioner seeks to raise in federal court. Granberry v. Greer, 107 S.Ct. 1671, 1675 (1987). Where, because of a procedural default, the state has not been afforded this opportunity, federal courts will hear a claim only if the petitioner can show both cause for the procedural default and actual prejudice. Engle v. Isaac, 456 U.S. 107, 129 (1982), aff'g Wainwright v. Sykes, 433 U.S. 72 (1977). Cause for procedural default will only be found when a "constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1 (1984). Where a claim is as well known and frequently litigated as Miranda, counsel's decision not to raise it will only constitute cause for procedural fault if counsel's assistance is found to have been ineffective. Engle, 456 U.S. at 134; Murray v. Carrier, 477 U.S. 477, 492 (1986). As discussed below, this court rejects petitioner's contention that his trial counsel was ineffective.

Thus, in deference to the state courts and the laws of judicial comity, this court is barred from considering petitioner's claim that the statements he made to the prosecution psychiatrist were elicited in violation of

Miranda and his fifth and fourteenth amendment rights and were erroneously admitted at trial.

II. Whether Trial Counsel's Failure to Object to the Testimony of the Prosecution Psychiatrist Deprived Petitioner of the Effective Assistance of Counsel.

To prove ineffective assistance of counsel, petitioner must allege that counsel made specific errors so serious that he was not acting as 'counsel' guaranteed by the sixth amendment and thus, that the proper functioning of the adversarial system and the reliability of the trial were undermined. Strickland v. Washington, 466 U.S. 668 (1984). This court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. Id. at 668.

Petitioner contends that he was deprived of the effective assistance of counsel because his trial counsel failed to object to the admission of the prosecution psychiatrist's testimony. Petitioner states that defense counsel could have avoided making numerous objections to specific aspects of the prosecution psychiatrist's testimony by objecting to the entire testimony on the grounds that petitioner was not warned that he could remain silent, that any statements made could be used against him or that he had the right to consult an attorney. See Miranda v. Arizona, 384 U.S. 436; see also



Estelle v. Smith, 451 U.S. 454, 461-69 (1981) (defendant must be warned that he has a right to remain silent before being questioned by a psychiatrist and has a right to consult with an attorney about his participation in the exam).

However, the efficacy of counsel's tactics is not an issue for this court. See Bashor v. Risley, 730 F.2d 1228, 1241 (9th Cir. 1984), cert. denied, 469 U.S. 838 (1984); see also United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1980), cert. denied, 545 U.S. 1127 (1981); see also Jones v. Barnes, 463 U.S. 745 (1983) (defense counsel has no constitutional duty to raise every nonfrivolous issue requested by defendant). Counsel's vigorous objections to specific aspects of the psychiatrist's testimony clearly establish the presence of an adversarial element at petitioner's trial. Defense counsel was clearly acting as the 'counsel' guaranteed petitioner by the sixth amendment.[1/]

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1. Petitioner claims that, under Townsend v. Sain, 372 U.S. 293 (1963), he is entitled to an evidentiary hearing to determine why defense counsel did not move to exclude the prosecution psychiatrist's testimony. Townsend does not stand for such a proposition and such a hearing is not appropriate in this case.

Accordingly, this court finds that petitioner was not denied the effective assistance of counsel.

III. Wnether the Evidence set Forth at Trial was Sufficient to Sustain a Conviction of First Degree Murder.

This court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Murder is the unlawful killing of another with malice aforethought. Cal. Penal Code Section 188 (West's 1988). To sustain a conviction of first degree murder the prosecutor must have presented sufficient evidence so that a reasonable jury might find that the murder was willful, deliberate, and premeditated. Cal. Penal Code Section 189 (West's 1988).

Petitioner contends that the evidence produced at trial does not support a finding that he committed first degree murder. It is unclear whether he claims that a rational jury could not have found that the killing was done with malice (required for both first and second degree murder) or that a rational jury could not have found that the killing was wilful, deliberate and premeditated (the additional elements required for first degree murder). However, after careful review of the



record, this court finds that a rational jury could have reasonably found all of these elements.

Malice may be implied when the killing proximately resulted from an act, the natural consequences of which are dangerous to life, and the act was deliberately performed by a person who acted with conscious disregard for life. People v. Mattison, 4 Cal.3d 177, 182-183 (1971); People v. Phillips, 64 Cal.2d 574, 587 (1966); see also Jackson v. Superior Court of City and County of San Francisco, 62 Cal.2d 521 (1965) (malice may be implied from assault with a dangerous weapon). The words willful, deliberate and premeditated should be construed in their ordinary dictionary meaning. People v. Orabuena, 56 Cal.App.3d 540 (1975). They refer to the mental state of someone who carefully weighs the course of action he is about to take and chooses to kill the victim after considering the reasons for and against it. People v. Fusselman, 46 Cal.App.3d 289 (1975). The jury may infer premeditation and deliberation from facts about how and what defendant did prior to the actual killing, the defendant's prior relationship and/or conduct with the victim, and the nature of the killing. People v. Anderson, 70 Cal.2d 15, 26-27 (1968).

The prosecution presented ample evidence from which a rational jury could have found malice, and willful, deliberate and premeditated intent to kill. The record showed that petitioner and his wife were estranged at the time of the killing, that petitioner's attempts at reconciliation had failed, and that he had been deprived of the companionship of his children. There was also evidence in the record to indicate that on May 31, 1975, petitioner armed himself with a pistol and extra ammunition, told a friend that he was going to put more notches on his gun, drove to his estranged wife's home and shot her in the chest. Petitioner claims that he did not intend to shoot her, but that the gun discharged during a struggle. However, two eyewitnesses testified that he shot his wife intentionally, from three feet away. There was also evidence that after the shooting he cut the telephone cord and refused to allow a doctor to be called.

This evidence, along with the other evidence in the record, supports a rational jury's conclusion that petitioner killed his wife with willful, deliberate, premeditated and malicious intent.



IV. Whether this Court is Barred from Reviewing Petitioner's Claims of Prosecutorial Misconduct and Improper Admission of Testimony.

Petitioner contends that the prosecution committed misconduct by misstating the evidence, by inducing witnesses to testify as it wished and by mischaracterizing petitioner. However, petitioner failed to object or request a curative admonition at trial. These steps are required by state law, in order to preserve the grounds for reversal. People v. Green, 27 Cal.3d 1, 27-36 (1980). As a result of this procedural default, these issues were not raised on appeal to the state courts and, as explained above, in the absence of cause and prejudice for the default, this court is precluded from considering the claim. See Wainwright v. Sykes, 433 U.S. 72 (1977). Here, where petitioner received the effective assistance of counsel, failure to object at trial is not cause for procedural default. Accordingly, this court is barred from considering petitioner's claim.

Petitioner also contends that he was entitled to a hearing on the ability of two allegedly emotionally disturbed witnesses to testify. However, petitioner failed to preserve this issue for further state review when it was not raised on appeal. Once again, petitioner's procedural

default is without cause and this court is barred from reviewing his claim by way of federal habeas corpus.

CONCLUSION

In sum, this court is barred by petitioner's procedural default from reviewing petitioner's claims that his Miranda and fifth and fourteenth amendment rights were violated by the admission of the prosecution psychiatrist's testimony at trial. Secondly, defense counsel's failure to object to the admission of the psychiatrist's testimony did not deprive petitioner of the effective assistance of counsel. Thirdly, this court finds that the evidence was sufficient to support a rational jury's conclusion that that petitioner willfully and maliciously killed his wife after premeditation and deliberation. Finally, petitioner's procedural defaults at trial and on appeal respectively, preclude this court from considering his claims that the prosecutor committed misconduct and that the testimony of two witnesses was erroneously admitted.

Accordingly, and good cause appearing, petitioner's petition for habeas corpus is HEREBY DENIED.

IT IS ORDERED.

DATED: December 9, 1988

THELTON E. HENDERSON
UNITED STATES DISTRICT COURT



**APPENDIX C**

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| PEOPLE OF THE STATE OF CALIFORNIA<br><br>Plaintiff and Respondent,<br><br>vs.<br><br>OWEN DUANE NUNNEMAKER,<br>Defendant and Appellant. | 1 Criminal 15379<br>(Super. Ct No. 7869-C) |

Defendant, Owen Duane Nunnemaker, was tried by a jury on an information charging him with the murder of his wife, Alice (count one); assault with a deadly weapon (Pen. Code, § 245, subd. (a)) (count two), and a violation of former Penal Code sections 12022.5 (use of a firearm), 3024, subdivision (a), and 12022 (armed with a deadly weapon).[1/] The jury returned a guilty verdict of first-degree murder (Pen. Code, § 187), and found that the

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1. Section 3024 was repealed by statutes of 1976, chapter 1139, section 279; sections 12022 and 12022.5 were amended by statutes of 1976, chapter 1139, sections 304-305, and by statutes of 1977, chapter 165, sections 91-92.

enhancement allegations were true.[2] On appeal from the judgment entered on the verdict, defendant raises several claims of errors. We have examined the entire cause, including the evidence, and determine that only one of his claims is meritorious; accordingly, we modify the judgment of conviction and - as so modified - affirm the judgment. We discuss each claim ad seriatim.

**Facts**

In the afternoon of May 31, 1975, defendant - armed with an automatic weapon - forcibly entered the home of his estranged wife, Alice, and following a struggle fired a single shot from a distance of three feet mortally wounding the victim. As witnesses to the shooting attempted to assist the fallen victim, the defendant restrained them from summoning aid and cut the telephone cord preventing its use to call an ambulance. One of the foster children,[3] Linda (age 16 years),

2. A not guilty verdict was returned on count two.

3. For several years defendant and his wife had maintained their Sebastopol family residence as a licensed foster child placement facility. On the day of the shooting, four foster children (ranging in age from 7 to 17 years), the three pre-teenage Nunnemaker children, and a family friend, Mrs. Mickey Brower and her son, were present in the Nunnemaker residence. Mr. Adrian Turner, a foster child counselor, also resided



managed to exit the home and called the sheriff's office on a neighbor's telephone. When the officers arrived, Linda informed them of the shooting. After all but one of the children had exited, the officers entered the home and observed the victim lying on the floor of the living room and another foster child, Sherry (age 17 years), at her side. During their search, they discovered the defendant in a rear bedroom where apparently he had just telephoned the sheriff's office requesting an ambulance. Defendant offered no resistance and was placed under arrest and searched; several rounds of 9 millimeter ammunition were found in defendant's pocket; defendant led the officers to his car parked in front of the house where they observed the weapon used[4] lying on the front seat.

At trial, Linda, Sherry, and Mrs. Brower testified that the defendant appeared sober and calm immediately after the shooting; the three arresting officers gave similar testimony concerning their observations of defendant at the time of his arrest.

there but was not present.

4. It was stipulated at trial that the 9 millimeter German Luger pistol, retrieved from defendant's automobile in the course of a warranted search, was the actual death weapon.

The defendant testified that he went to the home for the purpose of delivering a birthday present and to visit his children, which permission was refused by the victim. That as he and the victim were standing at the door, the victim suddenly "launched herself toward me." Thereafter, he could not recall any of the ensuing events until he walked to his car with his son Shawn and gave him the birthday present; he then noticed he was holding a gun in his hand which he placed in his car. Upon reentering the house, and thereafter seeing his wife lying on the floor, he telephoned the sheriff's office from the rear bedroom. Defendant denied that he had intentionally shot his wife whom he loved deeply.

The defense introduced psychiatric testimony in support of a diminished capacity defense; on rebuttal, the prosecution presented conflicting psychiatric testimony.

I. Insufficiency of the Evidence

Defendant contends that there was no substantial evidence presented during trial to support the jury's implied finding of premeditation, deliberation and willfulness, or malice, warranting at a minimum that the judgment be modified to a lesser conviction or degree of crime (Pen. Code, § 1181, subd. 6). Relying on a series of decisions where such remedial procedure was invoked



(People v. Bassett (1968) 69 Cal.2d 122; People v. Anderson (1968) 70 Cal.2d 15; and People v. Wolff (1964) 61 Cal.2d 795) defendant argues that in light of the whole record there was no reasonable, credible and solid evidence presented to justify the jury's implied findings of the requisite mental states. Additionally, focusing on certain evidence introduced by the prosecution, he argues that the permissible inference of innocence based upon such evidence is binding upon the People as establishing a reasonable hypothesis of innocence of first-degree murder. (See People v. Estrada (1923) 60 Cal.App. 477.)[5/] Our review of the whole record and the evidence adduced leads to our conclusion that defendant's contentions have no merit.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being (People v. Wolff, supra, 61 Cal.2d 795, 819-820; Pen. Code, § 188) and implied where "'the killing proximately

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5. His principal reliance is placed upon evidence of defendant's intoxication when he made certain damaging admissions both before and at the time of the shooting, the evidence surrounding the struggle between defendant and the victim immediately before the shooting, the defective safety mechanism on the death weapon, and observations by an independent witness that defendant had acted "crazy" earlier that morning.

resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (People v. Mattison (1971) 4 Cal.3d 177, 182-183; People v. Phillips (1966) 64 Cal.2d 574, 587.) Malice will be presumed when it is proven that the killing was committed by the defendant and nothing more need be shown. (People v. Conley (1966) 64 Cal.2d 310, 320.) Viewing the record in a light favorable to the People (People v. Reilly (1970) 3 Cal.3d 421, 425), the evidence that defendant went to the victim's home where - following a struggle - he forcibly gained entrance, thereafter pulled out the weapon and from a distance of a few feet, took deliberate aim and shot the victim, is not only sufficient to support a presumption of malice but is also sufficient to support an inference of express malice. (People v. Williams (1969) 71 Cal.2d 614, 624.)

Defendant argues that the psychiatric testimony produced in his behalf constituted substantial evidence negating his ability to harbor malice; additionally, that the conflicting psychiatric testimony produced by the prosection was legally insubstantial and thus a conviction of murder on such evidence cannot be sustained.

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Defendant is mistaken. It is well established that "'"[i]f the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.] The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, . . . [and] [t]he appellate court must determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. [Citations.]" (People v. Reilly, supra, 3 Cal.3d 421, 425.) And, under certain circumstances, the jury may even properly reject uncontradicted psychiatric testimony. (People v. Coogler (1969) 71 Cal.2d 153, 166 [cert. den. 405 U.S. 971].) "'The chief value of an expert's testimony in this [mental illness] field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . .' [Citation.]" (People v. Bassett, supra, 69 Cal.2d 122, 141.) Herein, while defendant's expert testified that the defendant had acted without malice, he also conceded the possibility that the defendant intended to kill his wife. Moreover, the prosecution's expert who had conducted an

independent examination of the defendant (cf. People v. Bassett, supra, where the prosecution's psychiatric testimony was based upon hypothetical questions alone) found similar psychiatric symptoms which in his opinion did not evidence a mental illness of such a serious nature as to preclude the ability to form the requisite state of malice. Such evidence, substantial in nature, was sufficient to support the jury's implied finding of malice which must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond (1969) 71 Cal.2d 745; see also People v. Anderson, supra, 70 Cal.2d 15; People v. Bassett, supra, at p. 139.) Nor is a contrary conclusion compelled by reason of the conflicting testimony given by Linda and Sherry as to whether the fatal shot occurred accidentally during the struggle or as a result of a deliberate act following that initial altercation, since it is for the jury in the final analysis to determine the effect and value of the evidence, including impeachment. (See Evid. Code, §§ 312, 780; People v. Muir (1966) 244 Cal.App.2d 598, 601.) Accordingly, we find defendant's contention to be without merit.

Defendant further contends that the record is barren of any solid evidence to support the finding of premeditation, deliberation and willfulness necessary to



sustain a first-degree murder conviction. With emphasis on the language of our Supreme Court in People v. Anderson, supra, 70 Cal.2d 15, he argues none of the evidence falls within any of the three classifications identified in Anderson essential to support an inference of the necessary mental states underlying a first-degree murder conviction. For the reasons which follow, we find this contention likewise unpersuasive.

As correctly stated by the People, the controlling test is "the ability of the defendant to maturely and meaningfully contemplate the gravity of his intended act." (People v. Sedeno (1974) 10 Cal.3d 703, 713.) While the statutory definition requires "'substantially more reflection than may be involved in the mere formation of a specific intent to kill . . . [¶] [t]he true test is not the duration of time as much as it is the extent of the reflection.'" (People v. Wolff, supra, 61 Cal.2d 795, 821.) In People v. Anderson, supra, 70 Cal.2d 15, the Supreme Court delineated three types of evidence which, singly or collectively, are necessary to sustain a finding of premeditation and deliberation: (1) planning activity directed to and explainable as intended to result in the killing; (2) prior relationship and/or conduct supporting an inference of evil motive; (3) and the manner of killing

itself. Unlike the factual circumstances reflected in the cases reviewed in Anderson, the record herein demonstrates sufficient evidence of premeditation and deliberation under any of the Anderson topologies. Prior to the actual killing defendant armed himself with a pistol and extra ammunition, openly stated he was going to put "a couple more notches" on his pistol, proceeded to his wife's residence where he forcibly gained entrance after a brief struggle and then delivered the fatal shot at pointblank range. Such evidence amply supports an inference that he had soberly reflected upon his contemplated act and formed an intent to kill his wife well before he arrived at her residence. The forcible entry and deliberate discharge of his pistol may be readily reconciled with a theory of a preconceived plan consummated after mature reflection. (Cf. People v. Hillery (1965) 62 Cal. 2d 692 [cert. den. 386 U.S. 938; rehg. den. 386 U.S. 1000]; People v. Kemp (1961) 55 Cal.2d 458 [cert. den. 368 U.S. 932].) The evidence of motive tending to establish preexisting reflection (Anderson at p. 27) was even more compelling; not only was it established that defendant had sometime earlier threatened to "blow her [his wife's] head off with a shotgun," but at the time of the killing the separation and



pending divorce had deprived him of a substantial part of his income as well as access to his children. Moreover, his stated belief that his wife was engaged in a meretricious relationship with Turner contradicted his professed affection towards her from which the jury could reasonably conclude that defendant, angered and embittered, was motivated to deliberately and intentionally kill his wife. The act of intentionally firing the pistol from close range into the victim's chest strongly supports an inference of premeditation. Unlike People v. Anderson, supra, 70 Cal.2d 15, 21 (involving multiple random stabbing upon the victim's body), the evidence here disclosed a single, well-placed lethal shot fired from a distance of approximately three feet. (Cf. People v. Hillery, supra, 62 Cal.2d 692.) Although testimony was presented supporting defendant's version of an accidental shooting during the struggle (including evidence of the defective safety mechanism on the Luger), such conflicting evidence related to a disputed question of fact for resolution by the jury. Clearly, the jury rejected a theory of accidental shooting in concluding that the killing was intentional. Where, as here, that determination is based upon substantial evidence, the jury's finding may not be

disturbed. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

Our review of the whole record reveals an aggregate of substantial evidence more than adequate to support an inference that the defendant was mentally capable to meaningfully reflect upon the gravity of his act and upon which the jury could reasonably base its implied findings of willfulness, premeditation, deliberation, and malice. (See People v. Anderson, supra, 70 Cal.2d 15.) Such findings must be accepted on appeal. (People v. Reilly, supra, 3 Cal.3d 421; People v. Redmond, supra, 71 Cal.2d 745.)

II. Miranda Error

Defendant further contends that prejudicial error was committed in allowing the testimony of the prosecution psychiatrist, Dr. Lowe, because he had not been advised of his Miranda rights (Miranda v. Arizona (1966) 384 U.S. 436) prior to the psychiatric interview; in addition, that the failure of his trial counsel to object to such testimony on Miranda grounds should not be considered on the issue of waiver. Defendant's contentions have no merit.

While it is generally established that Miranda principles apply to custodial interrogation of a defendant by a prosecution psychiatrist (People v. Bennett (1976) 58



Cal.App.3d 230, 236-237 and fn. 3) an objection based upon a Miranda violation cannot be raised for the first time on appeal. (People v. Bennett (1976) 60 Cal.App.3d 112, 116; In re Dennis M. (1969) 70 Cal.2d 444, 461-462.) Although the record is silent as to whether defendant was timely advised of such rights, the failure to interpose an objection during trial precludes our consideration on appeal. (People v. Bennett, supra, 60 Cal.App.3d 112, 116-117.)

Inferentially, defendant claims that the failure of his trial counsel to object effectively deprived him of a meaningful defense of diminished capacity in that the introduction of the prosecutor's psychiatric testimony conflicted with that of the defense. His argument is unsound. In order to successfully assert a claim of ineffective counsel, defendant has the burden of establishing such incompetence. (People v. Camden (1976) 16 Cal.3d 808, 816-817; People v. Martinez (1975) 14 Cal.3d 533, 538) as demonstrable reality (People v. Stephenson (1974) 10 Cal.3d 652, 661.) Under such governing principles, the record must establish that counsel was either ignorant of the facts or the law resulting in a withdrawal of a crucial defense that reduced the trial to a farce and a sham. (People v. Martinez,

supra, at p. 538.) Absence such affirmative showing, defendant is entitled to no relief. (People v. Jenkins (1975) 13 Cal.3d 749, 754-755 [cert. den. 423 U.S. 860].) Defendant has failed to make the requisite showing. Moreover, we cannot say that counsel's failure to object was not motivated by reasons of trial strategy or tactics. Defense counsel could readily have concluded that a tactical advantage could be gained through cross-examination of the expert witness revealing bias, the limited basis of his opinion and forensic experience in homicide cases. Failure to such assumed tactics does not demonstrate ineffectiveness and a party may not be permitted ""to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.'" [Citation.]" (People v. Tappan (1968) 266 Cal.App.2d 812, 817.) Similarly, we see no merit in defendant's disjointed claim of involuntariness of his statements during the questioned psychiatric interview, in the absence of any objection based upon such grounds. Defendant fails to direct our attention to the relevant portion of the record (see Cal. Rules of Court, rule 15(a)), nor has our examination thereof disclosed such an objection. We find no error herein.



III. Prosecutorial Misconduct

Defendant further complains of prejudicial misconduct committed by the prosecutor and his "advocate" in engaging in a "McCarthy-type" attach maligning his character and motives in order to depict him as a "bad guy" in the eyes of the jury. We have examined each of these claims and find them to be without merit.

To sustain a charge of misconduct it must be unequivocally demonstrated that the conduct involved a dishonest act or an attempt to persuade the court or jury by use of deceptive or reprehensible methods. (People v. Strickland (1974) 11 Cal.3d 946, 955; People v. Beivelman (1968) 70 Cal.2d 60, 75 [cert. den. 406 U.S. 971].) We first observe that none of the claimed acts of misconduct were objected to at trial; generally, a failure to raise such timely objection forecloses consideration of such misconduct on appeal. (See People v. Jenkins (1974) 40 Cal.App.3d 1054, 1057; People v. Asta (1967) 251 Cal.App.2d 64, 87; and People v. Ney (1965) 238 Cal.,App.2d 785, 790.) The record demonstrates that, with one exception (a leading question), defendant both failed to object to the cited instances or request an assignment of misconduct or curative admonition. Nonetheless, defendant urges that his failure to object may be excused

when the case is "closely balanced . . . [and] the misconduct contributed materially to the verdict or unless the harmful results . . . could not have been obviated by a timely admonition to the jury." (People v. Varnum (1969) 70 Cal.2d 480, 488 [cert. den. 406 U.S. 971]; People v. Ney, supra, at p. 790.) The record does not support defendant's assertion in order to base a claim of waiver. The questioned conduct related to certain statements made by the prosecutor during opening statement and closing argument in which the defendant was characterized as a lazy inebriated who enslaved his wife to his every bidding, and that he had stated during the telephone call to the sheriff's office that he had shot his wife. The prosecutor's statements reflecting upon defendant personally were clearly relevant to the issue of motive on the part of the defendant. (See People v. Clifton (1967) 248 Cal.App.2d 126, 133.) While the tape recording of the subject telephone call indicates that defendant did not make the statement attributed, the actual tape recording was played before the jury several times so that they could not possibly have been misled by the prosecutor's mistaken recollection of the substance of that call; indeed, the defendant himself testified that he believed he had made that admission on that occasion. In



any event, there was independent evidence that defendant did shoot his wife. The testimony[6/] by Dr. Lowe (characterized as the prosecutor's "advocate"), elicited in response to defense counsel's question, was relevant for the limited purpose of establishing matters upon which he relied in forming his expert opinion. (See Evidence Code, section 801. subd. (b); Witkin, Cal. Evidence (2d ed. 1966) section 410, p. 368.) No "misconduct" by the witness is manifested. Defendant's remaining claim of "unethical

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6. - The actual testimony complained of, as underscored, is reported as follows:
"Q [By defense counsel] I will rephrase it.
"A Taking that into consideration --
"Q I mean taking all of those things that he is an intelligent man and all of the other things into consideration, you wouldn't expect a man of his intelligence, that everybody has testified to, to go over there with the intent to kill his wife, would you?
"A <u>There is some evidence that I don't know whether it has been introduced into court or not, into this trial, that indicated at one point that he said, you know, if she leaves me, I will.</u>
"Q No, that's not been in here, no, no.
"A No. Okay, okay, that's --
"Q That's why Mr. Gallagher [the prosecutor] didn't bring it in. Taking those things into consideration, you wouldn't expect him to go over there with the intent to kill, would you?
"A I don't know. I cannot say.

conduct," unsupported by the record, is determined to be groundless.

IV. Jury Instructions

Defendant next contends that the jury instructions on intoxication as related to the defense of diminished capacity were incomplete and failed to adequately distinguish the significance of evidence of voluntary intoxication bearing upon that defense from that involved in the general intent crime charged in count two. Our examination of the challenged instructions reveals the contention to be specious. The jury was properly instructed on all of the essential elements of the murder charge and on the effect of intoxication relevant to the defense of diminished capacity and the lesser included offenses of voluntary and involuntary manslaughter.[7] Moreover, in giving CALJIC instruction No. 4.20 (voluntary intoxication not a defense to a general intent crime) the court expressly limited that instruction to the aggravated assault charge contained in count two, of which defendant was ultimately acquitted. Defendant's companion argument that the court was obliged to give a

7. The instructions given included standard CALJIC instructions Nos. 4.21, 4.30, 8.41, 8.47 and 8.77 (CALJIC 3d ed.).



"particularized" instruction regarding the defendant's level of intoxication is unsound. Since the court gave the required instructions concerning circumstantial evidence (CALJIC Nos. 2.00-2.02 (CALJIC 3d ed.)), as conceded by defendant, no further instructions were required or appropriate, particularly in the absence of any request by the defendant. (See generally People v. Rocha (1978) 80 Cal.App.3d 972, 980, and authorities there collected.) We find no error here.

V. Enhanced Punishment

Relying on People v. Bennett, supra 60 Cal.App.3d 112, defendant argues that the enhanced punishment based upon the jury findings made under the provisions of Penal Code section 3024, subdivision (a), and 12022 may not stand.

Our Supreme Court held in People v. Walker (1976) 18 Cal.ed 232, 243-244, that a finding pursuant to Penal Code section 12022.5, is of no legal effect in a case involving a sentence of life imprisonment upon conviction of the basic crime in which a firearm was used. "Defendant would thereby be sentenced to life imprisonment plus a consecutive term of five years to life, providing a prison sentence theoretically extending beyond death." (P. 243.) The facts of the case at bench fall

squarely within the prohibition of Walker; accordingly, any additional punishment imposed pursuant to said finding is invalid and must be stricken. Similarly, the punishment pursuant to Penal Code section 12022 can have no effect since it, too, would subject defendant to prison sentence beyond death.[8/] The enhancement imposed pursuant to section 12022 must also be stricken.[9/]

The superior court will modify the judgment, and abstract of judgment and commitment to state prison, by striking therefrom the punishment imposed pursuant to Penal Code sections 12022 and 12022.5; as so modified, the judgment is affirmed.

Racanelli, P.J.

WE CONCUR:

Elkington, J.

Low, J.**********/

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8. - The language and legislative intent of former section 12022 are substantially similar to those of section 12022.5 in providing for an additional punishment of at least five years' imprisonment. (See People v. Walker, supra, 18 Cal.3d 232, 241; People v. Chambers (1972) 7 Cal.3d 666, 671-672.)

9. - We recognize that former section 3024, subdivision (a), imposed a minimum term of imprisonment of two years. Since defendant is already subject to a minimum term of incarceration of seven years based on his life sentence (Pen. Code § 3046), the finding under section 3024, subd. (a), can serve no purpose for enhanced punishment. However, we note that the finding that defendant was armed at the time of the offense could have some future consequence. (See, e.g., Pen. Code, § 1203.06, subdivision (a)(1).) Therefore, we decline to strike the finding that defendant was armed within the meaning of section 3024, subdivision (a).

**********. Assigned by the Chairperson of the Judicial Council.

# APPENDIX D

**ORDER DENYING WRIT OF HABEAS CORPUS**

**Criminal No. 25449**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**IN BANK**

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In re NUMMEMAKER (OWEN DUANE)

on Habeas Corpus.

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**Petition for writ of habeas corpus DENIED.**

(In re Swain (1949) 34 Cal.2d 300, 304; In re Waltreus (1965) 62 Cal.2d 218, 225.)

Original Signed - BIRD
Chief Justice

**SUPREME COURT FILED: December 3, 1986**
**Lawrence P. Gill, Clerk**

# APPENDIX E

**ORDER DENYING WRIT OF HABEAS CORPUS**

**No. S004531**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**IN BANK**

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IN RE OWEN DWAYNE NUNNEMAKER

ON

HABEAS CORPUS

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**Petition for writ of habeas corpus DENIED.**

Original Signed
Acting Chief Justice

**SUPREME COURT FILED: April 7, 1988**
**Lawrence P. Gill, Clerk**